Stamped file copy to petitioner.

IN THE SUPREME COURT OF THE UNITED STATES

CASE NUMBER: 79-5145

OCTOBER TERM, 1979

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SUPREME COURT, U.S.

GEORGE EDDIE SAM #94459
PETITIONER PRO SE

-VS-

THE STATE OF OKLAHOMA
RESPONDENT

PETITION FOR WRIT OF CERTIORARI

CERTIORARI TO REVIEW THE FINAL JUDGMENT, DATED APRIL 27, 1979, CASE NO. F-77-621, OF THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

George Eddie Sam #94459
P.O. Box 97
McAlester, Oklahoma 74501

Petitioner Pro Se

IN THE
SUPREME COURT OF THE UNITED STATES

NO._____

GEORGE EDDIE SAM #94459
PETITIONER

-VS-

THE STATE OF OKLAHOMA, et. al.,
RESPONDENT(s)

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

To the Honorable Chief Justice and Associate Justice of the Supreme Court of the United States:

I.
NATURE OF THIS PROCEEDING

This is a Petition for Writ of Certiorari by George Eddie Sam, #94459, a State Prisoner, who was tried by a jury in the District Court of Muskogee County, State of Oklahoma, on information No. CRF-76-248 alleging the crime of Delivery of a controlled Drug After Former Conviction of Burglary alleged to have occurred on or about June 26, 1976. The jury returned a verdict of guilty as charged on February 15, 1977. Motion for new trial was filed on March 2, 1977 and overruled with exceptions on March 2, 1977. Judgment and sentence was imposed on March 2, 1977 at a term of 40 years imprisonment under the control of the Department of Corrections of the State of Oklahoma. Petitioner filed his notice of intention to appeal and designation of the record on March 9, 1977. The Court set bail pending appeal at the amount of $40,000.00 and the petitioner being unable to post same was transported and incarcerated in the State Penitentiary in McAlester, Oklahoma -P.O. Box 97, 74501

Subsequently thereafter, and on or about December 2, 1977, petitioner, George Eddie Sam's attorney at law (Mary E. Bane of Oyler and Smith - 100 Investors Capitol Bldg., Oklahoma City, Oklahoma 73102) filed in the Oklahoma Court of Criminal Appeals under No. F-77-621, petitioner's direct appeal - Brief of appellant.

In said appeal, petitioner's appellate counsel, inter alia presented as Proposition No. #1, the issue:

#1. It was error for the Defendant to be sentenced under 21 O.S. 51(B), which the Court has held to be unconstitutional as a vague legislative enactment.

Upon review of said Proposition No. One, the Oklahoma Court of Criminal Appeals in an opinion styled: Sam V. State, Okl. Cr.,___P.2d___ No. F-77-621 (Mar. 27, 1979), insofar as Proposition One was concerned modified petitioner's judgment and sentence from 40 years to a term of 25 years' confinement in the State Penitentiary, and as modified the judgment and sentence was affirmed.

Appellate counsel thereafter filed a petition for Rehearing and on April 27, 1979, the court in Sam V. State, supra issued its order Denying petition for Rehearing and Issuance of Mandate forthwith.

II.
THE OPINION BELOW

The Opinion below dated March 27, 1979, is a published opinion of the Oklahoma Court of Criminal Appeals, case Number F-77-621, affirming (But modifying to 25 years imprisonment) the final judgment in Case No. CRF-76-248 of the District Court of Muskogee County, Oklahoma. On April 27, 1979 a Petition for Rehearing was denied. Xerox copy of the Order affirming the petitioner's direct appeal in Case No. F-77-621 is attached herewith as petitioner's Exhibit #1 and a Xerox copy of the Order Denying petition for Rehearing is attached herewith as Petitioner's Exhibit #2.

III.
JURISDICTIONAL STATEMENT

The statement of the grounds on which the jurisdiction of this court is invoked is as follows.

The petitioner George Eddie Sam alleges that he is being deprived of his liberty in violation of the Due Process Clause of the 14th amendment. Specifically the petitioner alleges that, inter alia, the trial court gave an instruction based upon an invalid Oklahoma Statute (Title 21 O.S. Section 51(B). The trial court instructed the jury that there was only one mandatory sentence which was 40 years. Under the Oklahoma Statute involved, Title 21 O.S. Section 51(B), the sole sentence to be imposed was a "Mandatory term of 40 years". Thus the jury was compelled under trial court's instructions to impose a mandatory 40 year term. The petitioner alleges, because the said Oklahoma Statute Title 21 O.S. Section 51(B) was subsequently declared null and void that:

#1. The Trial Court's instructions denied him due process of law;

#2. The verdict of the jury denied him due process of law; and

#3. The manner in which the 40 year sentence was imposed denied him due process of law as the same is provided by the due process Clause of the 14th amendment.

Also, under the facts and circumstances of this case the petitioner was denied the Equal Protection of the laws by the action of the trial court and by the action of the Oklahoma Court of Criminal Appeals.

The date of the final judgment No. #F-77-621 is March 27, 1979 and the date of the order denying rehearing is April 27, 1979.

Since the Oklahoma Court of Criminal Appeals is the highest state court. It is believed by the petitioner that this court has jurisdiction under Title 28, U.S.C. Section 1257. See and Compare, Hicks V. Oklahoma___U.S.___ No. 78-6885 (1979) and also See, Drennon V. Oklahoma ___U.S.___No. 78-5242 (1978).

IV
QUESTIONS OF LAW PRESENTED FOR REVIEW

#1... The first question presented is whether, under the facts and circumstances involved in this instant case, the mandatory 40 year sentence was imposed in a manner that violates the following provisions of the 14th amendment: "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of.....liberty, or.....without due process of law"?

#2... The second question is (1) whether the action of the trial court and (2) whether the action of the Oklahoma Court of criminal appeals denied the petitioner the Equal Protection of the laws since the said Oklahoma Statute Title 21 O.S. Section 51(B) was declared null and void on October 14, 1977 in Thigpen V. State, Okl. Cr., 571 P.2d 467, as a matter of Constitutional Law?

V.
FEDERAL CONSTITUTIONAL PROVISIONS INVOLVED

1. 14th Amendment, United States Constitution

OKLAHOMA STATUTE INVOLVED

Title 21 Okla. Stat. Supp. (1977) Section 51(B):

"Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the state penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable had it been a first offense;....."

VI
STATEMENT OF FACTS
AND
STATEMENT OF THE CASE

The conviction here resulted from a jury trial on February 15, 1977, in case No. CRF-76-248 from the District Court of Muskogee County Oklahoma, before Hon. William H. Bliss, District Judge.

The petitioner, George Eddie Sam was charged by the State of Oklahoma with the offense of Delivery of a controlled Drug, after former conviction of a felony.

The petitioner Sam, for whom this certiorari petition is lodged, received a sentence of 40 years in the State Penitentiary after his conviction in Muskogee County on February 15, 1977.

STATEMENT OF FACTS

KELLY OLIVER-PROSECUTION WITNESS NO. 1:

Kelly Oliver testified that she was an investigator for the District Attorney's office in Muskogee county and was employed on or about June 24, 1976. She was also working for the Oklahoma Bureau of Narcotics and with the Muskogee Police Department. On the evening of June 24, 1976 she received a telephone call from Eddie Sam, who she identified in the courtroom. She stated Mr. Sam told her he had a gram of cocaine for her. The price was established to be $110.00. She agreed to meet him at the CB Cafe in Muskogee and arrived there at approximately 8:00 p.m. Mr. Sam was standing near the front door, he greeted her, and they then moves toward the rear of the building and sat in a booth.

The ordered a couple of bottles of beer and visited for a few minutes and then Mr. Sam asked her if she was ready to do business. She told him yes so he directed her to law her money on the table. At that time Mr. Sam reached over and picked up an upside down Coor's ashtray and under the ashtray was a packet of white powdery substance. She picked up the packet and put it in her pocket and he put the $110.00 in his pocket.

Mrs. Oliver remained at the cafe for twenty to twenty-five minutes and then left and went to the residence of Officer Clayton Bratt of the Muskogee Police Department. There the substance was placed in an envelope.

On Cross-Examination Mrs. Oliver stated that she was goind under the name of Jody Thomas on June 24, 1976. In her undercover capacity for the Oklahoma Bureau of Narcotics she was receiving money but was also supporting herself by working at bars. She worked at the Top Hat Club, the catalina Villa and the 106 Bar. At the time of the alleged cocaine transaction she was not working at bars. [illegible] At the time of the alleged cocaine transcation she was not working as an investigatory for the District Attorney's Office. Her expenses were being paid by the State Bureau.

She stated that this call From Mr. Sam was not out of the blue. They had talked previously on June 22nd. At that time she asked if there was any cocaine available and Mr. Sam said he would check it out that there might be. She was the one asking to purchase the cocaine. This conversation occurred at the 106 Bar where Mr. Sam had met her pursuant to a request she made to his nephew to have him meet her. She admitted that she initiated the discussion on narcotics when Mr. Sam came into the 106 bar. Prior to that time George Sam had not told her he wanted to sell her any cocaine.

She was employed as a bartender at the 106 Bar at the time of this transaction. She worked part time, approximately five to ten nights a month, for $10.00 a night. She admitted that she had been convicted of a Bogus check charge in June of 1975 and that she received a three years suspended sentence on the charge. She had been working for the Oklahoma Bureau of Narcotics for approximately two years.

She [illegible] stated that she had asked Mr. Sam if there was any cocaine available or if he could get any. She did not remember the exact conversation, however she remembered Mr. Sam said he thought he could get it. she did not recall any statements in the conversation to Mr. Sam that she needed the cocaine. However, she stated that she may have told him that she had gone on a trip to meet some suppliers, that she couldn't buy any cocaine and that she needed cocaine.

Prior to the conversation on June 23, 1976 she had had conversation with Mr. Sam. She originally met him on March 10, 1976 at the 106 Bar where she was drinking beer. They were introduced to each other by the bartender and had a brieff conversation. They then went to another bar and had another beer. The conversation was general conversation but she did not recall any conversations concerning narcotics at that time. She next saw him about a month later in April, 1976. He came into the Catalina Villa Lounge where she was working at the time. He came in with another man and they were drinking beer. She approached him and asked him about getting some amphetamines and he told her he thought he could get some, that he would check and see. She indicated to him that she wanted to buy a thousand pills from him at that time. He said he would check and contact her later. He had not brought the conversation of narcotics up, but she had.

She did recall a conversation about CB radios to sell and that she used this as a point of conversation with him. At this meeting several nights after the meeting at the Catalina Villa she admitted that she had initiated the conversation on pills, again. She was sure that she did express to him an interest in buying the pills. She admitted that it was very possibly true that every time she talked to Mr. Sam about drugs or discussed or talked about drugs that it was always either her calling and starting the conversation or initiating the conversation or talking him into selling them.

In the middle of June, 1976 when she talked to him about cocaine, it was the first time. She stated that she had received intelligence information, not specifically about Mr. Sam, but that there was cocaine available on the street in Muskogee and she just simply asked Mr. Sam if he could get her some. Mr. Sam did not initiate the conversation. He did not offer to sell her any cocaine prior to her asking him for it.

On re-direct examination she stated that she did not force Mr. Sam to sell her the cocaine, she just asked for it. She stated that she had asked Mr. Sam for some amphetamines he had obtained them for her. She then identified State's Exhibit No. 1 as an evidence envelope with her signature on it. She stated it appeared to be the same envelope that she and Clayton Bratt put the cocaine in. State's Exhibit No 1 was then admitted into evidence.

On Re-Cross examination she admitted that she had pleaded with Mr. Sam to get her the amphetamines saying that she needed the pills because she had to make a trip to Oklahoma City, and that she had to come back the next day and work the next night. She, in essence, pleaded with him for the amphetamines. She did not just say get me some pills. She only received two hundred pills from Mr. Sam and not the one thousand that she was trying to obtain. She did not remember begging Mr. Sam for the cocaine. When she left the CB Cafe after obtaining the cocaine she drove to Clayton Bratt's residence which is a 3 to 5 minute drive. She arrived at Mr. Bratt's home at 8:40 p.s.

On re-direct examination Mrs. Oliver identified State's Exhibit No 2 as a packet containing her initials which contained the white substance she received from Mr. Sam on June 24, 1976. She then testified that she had made full restitution on the bad check charges for which she was under a 3 years suspended sentence.

On re-recross examination she testified that inn May and June of 1976 she did have a pistol. The pistol was her brother's and she kept it in her apartment, even though she knew it was a violation of the law. She received no permission from anyone to keep the pistol at her [illegible] apartment.

CLAYTON BRATT- PROSECUTION WITNESS NO. 2:

Clayton Bratt stated that he worked for the Muskogee Police Department and was assigned to the Tactical unit which worked on narcotics cases, among others. On June 24, 1976 he met with Kelly Oliver. He identified state's Exhibit No 2 as the packet she brought him.

He testified that he was contacted about 7:00 p.m. on June 24th by Kelly Oliver and that she stated she had a buy set up with Mr. Sam for a gram of cocaine. She stated that she needed about $110.00. They obtained the money for the buy and he followed her to the CB Cafe. She went in and returned about thirty minutes, got in her car and he followed her back to his place. At his apartment she turned the evidence over to him and it was placed in an evidence envelope. He placed the evidence in an evidence locker and it was later turned over to the District Attorney's office.

There was no cross-examination of Mr. Bratt.

GERALD BELYER - PROSECUTION WITNESS NO. 3:

Gerald Delyer testified that he was a forensic chemist for the State of Oklahoma, the State Bureau of Investigation, and was stationed at McAlester, Oklahoma. He identified Exhibit No. 1 as an envelope he received on August 2, 1976 at the laboratory in McAlester. He identified State's Exhibit No. 2 as a substance he had analyzed subsequent to August 2, 1976. His testing showed that the white powdery substance contained cocaine. He stated that when he brought the envelope to court that morning it had been sealed and he had had custody of it until ~~the~~ he handed it to a member of the District Attorney's staff who brought it to the courtroom.

On cross-examination Mr. Belyer stated that he believed the envelope contained approximately 1.1 rams of substance.

GEORGE EDDIE SAM - DEFENSE WITNESS NO. 1:

Mr. Sam testified that he was 42 years old and had lived in Muskogee since 1972. Prior to that time he had been in California, but had been ~~raised~~ raised in Muskogee. He admitted a prior conviction for burglary in Illinois. After a plea of guilty. He stated that he had an attorney the day he went to court. About 2 years later he pled guilty to another charge in Illinois . After his parole he went to California where he served out his parole and then returned to Oklahoma. He had no other convictions.

He testified that he met Kelly Oliver at the 106 Bar. The Bartender introduced her and they began talking. They went next door to another bar called Sam's and had another beer or two. That was the last time he saw her for awhile. The next time he saw her was at the Catalina Villa. They began a conversation and she told him that she had been in trouble with the law. He admitted to her that he had too. She told him she needed to be making a little bit of extra money because all the money she had was that from working at the bar as a bartender.

He believes he saw her 2 or 3 other times but nothing ever happended.

One day his nephew told him that Kelly Oliver wanted to see him. He called her up on his lunch hour and she tried to get him to buy some CB radios that had been brought in by a friend from Texas. He agreed to meet her but did not show up. Several days later he called her about the CB radios but she stated that they had already been sold.

About a month later his nephew came to the place he worked and told him that the heavy-set girl at the 106 Bar wanted him to get in touch with her. He did not go to the bar that day, and his nephew came back the next day and told him that the girl was still asking about him. The nephew stated that Mrs. Oliver told him to tell Mr. Sam if Mr. Sam couldn't come down to the bar to please call her. She wanted to get hold of him.

Mr. Sam dropped by the 106 Bar where she was working and they shot pool and he drank a beer. She then told him that she was in a "jam" that she had been up all day and that she had to work the night shift that night,. She stated that after she got off of work that night she had to drive to Oklahoma city to see her daughter and then come back the next day and work the next night. She stated that she wann't going to get any sleep at all and needed some pills to keep her awake. She asked him to check around for her and see if he could find her some. He told her that he would check around, at which point she told him that she could not make it without them. So Mr. Sam checked around and found two hundred small pills. Mr. Sam gave the man $50.00 for them then took them to Mrs. Oliver who gave him his $50.00 back. He never asked her at any time if she wanted to buy any pills and denied that he ever asked her at any time if she wanted to buy any pills and denied that he ever sold any pills in his life except those that he obtained for Kelly Oliver.

Two or three days later he stopped at the 106 Bar and visited with Kelly Oliver. She told him that the trip she took to Oklahoma City was a bust. She testified that she got there and could not buy any cocaine. She told him she really needed some and asked him if he knew where she could get some. He stated that he did not. She then asked him if he would look around and try to find some, and he told her that he would.

He stated that the man who had the cocaine was at the CB Cafe with him. The man with the cocaine did not want to meet Kelly Oliver, and had him set the cocaine in the booth under the ashtray. When he obtained the money from Kelly Oliver ~~in~~ he gave it back to him. He stated that he never requested or asked Kelly Oliver to buy any cocaine or narcotics from him. He stated that he kind of liked Mrs. Oliver, that she was just alone and working down there trying to get along like everyone else. He knew that she did not make much money in the bar and she had told him she was hustling to make a few dollars. He would not have obtained any of the drugs for her except for her pleading with him to find some for her. He stated that it was easy enought to find the items because you could just walk through town and buy them. He did not receive any profit from his transaction with Mrs. Oliver. He did not need the money because he was working and his wife was working.

On cross-examination he again stated that he would not have sold her the pills or cocaine if she had not begged like she did. He had never sold any drugs or narcotics before and he could not think of a situation where he would do it again. He denied that he would sell to anyone who came up to him. He stated his reasons for trying to help Kelly Oliver is that she was working hard, her child was in Oklahoma city, and that Kelly Oliver had to get to the city and back. He stated that he felt sorry for her. He denied that he had ever told Kelly Oliver that he dealt in heroin. He further denied that he had a conversation with Kelly Oliver in which he tried to talk her into transporting a large amount of narcotics to Kansas. He further denied telling Kelly Oliver that he dealt in large amounts of cocaine and marijuana. He denied that he had tried to set up large dope deals with other people.

He stated that on the amphetamine transaction, he gave $50.00 to the source out of his own pocket and Kelly Oliver gave him $50.00 back which he put in his own pocket. He did not remember who it was he had bought the amphetamines from. He knew the man who had the cocaine only as Phil. As far as he knew Phil liver up toward Oklahoma City and came to Muskogee every week. Mr. Sam had told Phil that he needed cocaine for a friend of mine who needed some real bad. He asked Phil if he had any to sell him and and he would call up the girl and see if he could do something for her. He testified that the conversation about the CB radios was brought up by Kelly Oliver. She told him she had 17 or 19 of them. Mrs. Oliver said she had a friend down in Texas where they made the CB radios and wanted to know if Mr. Sam would buy them. She did not say that the radios were stolen.

TOMMY JOE SAM - DEFENSE WITNESS NO. 2:

Tommy Sam testified that George Eddie Sam was his uncle. He met Kelly Oliver through his uncle at the Catalina Villa. On a subsequent visit to the Catalina Villa, when he was by himself, Kelly Oliver came up and told him that she needed to know where Eddie Sam was and that she needed to talk to him. She did not say why she needed to talk to Eddie Sam.

He later saw her quite a few times at the 106 Bar when he was there to drink beer and play pool. She gave him a piece of paper with a phone number on it and asked him to give it to Eddie Sam. She told him she had a cousin or nephew or someone that had a bunch of CB radios to sell and wanted to know if Eddie Sam wished to buy them. He went over to his uncle's house and gave him the note. He did not know if Eddie Sam went and met her.

He later saw her off and on at the Catalina Villa. It seemed she was always asking about Eddie Sam every time he saw her and wanted to know where he was. She would ask to see Eddie Sam and ask him to have his uncle come by.

CLOSING ARGUMENTS WERE GIVEN AND THE JURY RETURNED A VERDICT OF GUILTY. THE SECOND STAGE OF THE TRIAL THEN BEGAN.

TWO EXHIBITS OFFERED INTO EVIDENCE:

At the opening of the second stage of the trail the prosecutor offered for identification purposes and as evidence on behalf of the state of oklahoma evidence of the crimes listed on the second page of the information, to-wit:

On June 5, 1967 there was a burglary conviction of George Eddie Sam in the District Court of Woodford County, Eureka, Illinois, Case No. 67-CR-4, in which the defendant was sentenced from 2 to 12 years in the Illinois State Penitentiary. He also offered for the same purpose a court clerk's certificate to a conviction for burglary in the district court of McLean County, Bloomington, Illinois in which the defendant George Eddie Sam was sentenced to from 15 months to 4 years in the Illinois state penitentiary in Case No. 69-CF-645. Mr. Edmondsom stated that the clerk's certificates reflected the judgment and sentences in the cases and certified the representation of the defendant George Eddie Sam in both cases by counsel. It also reflected that the convictions were final and that no appeals were taken therefrom. He further offered for the Jury's information the testimony of the defendant in stage one of the trial. These exhibits were marked as State's Exhibits No. 1 and No. 2, were offered into evidence, and were admitted.

Defense counsel moved for a dismissal on the second page of the information, reiterated his prior motions and moved for a directed verdict on the second stage of the trial.

Closing arguments were given and the jury returned a verdict of guilty on page 2 of the information with a recommendation of a 40 year sentence under the direction and control of the Department of Corrections of the state of Oklahoma.

At the second stage of the trial the jury, in the Court's instructions was given two alternatives for imposing sentence in this case. The first alternative was that the petitioner could be sentenced for distribution of a narcotic drug to a term of imprisonment for not less than 5 years nor more than 20 years and a fine of not more than $20,000.00. (Court's instruction No. #1). Court's instruction No. 2 instructed the jury that if they found that the defendant - petitioner had twice been convicted of a felony and that this was his third felony offense he must be punished for a term in the state penitentiary of 20 years plus the longest imprisonment for which distribution of a narcotic could be punished, in this case 20 years. Thus the jury was told that if they believed defendant had 2 former convictions of felonies the minimum punishment they could impose upon him was 40 years in the state penitentiary. The jury, after finding the former convictions, did recommend a sentence of 40 years in the state penitentiary, the minimum they were instructed they could recommend.

In Thigpen V. State, Okl. Cr., 571 P.2d 467 (Decided October 14, 1977) the Oklahoma Court of Criminal Appeals ruled that 21 O.S. 51(B) was unconstitutional. The court in Thigpen stated:

> "Section 51(B), however, is so vague and illusory when construed with Section 51(A) that it cannot be construed in such a manner as to implement the Legislative intent, and because of its vagueness and demonstrated defects we are of the opinion that 21 O.S. Supp. 1976, Section 51(B), is unconstitutional....."

The question of law was raised on direct appeal. See, Petitioner's Exhibit #1 attached at back herewith.

The Oklahoma Court of Criminal Appeals (Exhibit #1), said:

Hon. Tom Cornish
Judge..... "In urging reversal or modification of his sentence, the appellant first contends it was error for the trial court to instruct under 21 O.S. Supp. 1976, Section 51(B), since it was held to be unconstitutional in Thigpen V. State, Okl. Cr., 571 P.2d 467 (1977)..... We agree such error requires a modification of the sentence in the case at bar, however, as in Thigpen V. State, supra, such error does not require reversal. Since part A of 21 O.S. Supp. 1976, Section 51, was severable from Part B and has not been held to be unconstitituional it must be applied in the instant case..... This court, therefore, applies 21 O.S. Supp. 1976, Section 51(A), and modifies the sentence from forty (40) years imprisonment to a term of twenty-five (25) years imprisonment....."

In compliance with Rule #23(1) (F) of the Rules of the U.S. Supreme Court, the manner in which the lower-court ruled on the question presented is shown above.

Thus, the stage of the proceedings where the question presented was raised for the first time is shown above, and also, the manner in which the court ruled on the question presented is shown.

The petition for rehearing was denied on April 27, 1979 and from this order (since it is the final judgment of the state court) the petitioner seeks to have this final judgment reviewed by a petition for writ of certiorari.

~~VIIIx~~
VII.
ARGUMENT

#1... When the sentence of 40 years was imposed, the procedure employed by the trial court denied the defendant George Eddie Sam due process of law.

#2... The trial court's instructions to the jury that a sentence of 40 years was mandatory denied the defendant both due process of law and the equal protection of the laws.

#3... Under the facts and circumstances of this case, the mandatory sentence of 40 years imposed by the trial court and then modified to 25 years by court below on direct appeal violates both the 8th and 14th amendments.

To not burden this Honorable Court with academic perusal, petitioner respectfully points out that the facts, and circumstance and argument in the instant case are similar (if not identical) to those in Hicks V. Oklahoma.)_____U.S._____ no. 78-6885 (filed June 21, 1979), and not be repeated here. Flynn H. Hicks; the petitioner in Hicks V. Oklahoma, supra suffered his conviction out of the district court of oklahoma county, case No. CRF-76-4597 and the petitioner Geogge Eddie Sam herein suffered his conviction in and out of the district court of Muskogee County, Oklahoma, Case No. CRF-76-248. However, the federal constitutional error complained of in this instant petition are identical in both cases.

Also, when the Oklahoma Court of Criminal Appeals refused to correct the error (modification of a sentence does not cure a denial of due process).... the said error again compounded,. It is believed by the petitioner that the error violated the privisions of the 14th amendment to the federal constitution.

If the petitioner George Eddie Sam is correct that the error did violate the provisions of the 14th amendment in that event, the said mandatory sentence of 40 years and the lower court's modification of same to 25 years is void. See, Rummel V. Estelle, 99 S.Ct. 2403.

Under different facts and circumstances this court recently struck down "Mandatory Sentences" in the following cases:

See.... Woodson V. North Carolina, 428 U.S. 280
See.... Coker V. Georgia, 430 U.S. 584.

However, on January 8, 1979, this court refused to strike down the New York mandatory life sentence for certain drug convictions. See, Carmona V. Ward, 439 U.S.____, 99 S.Ct. 874, 58 L.ed.2d____, no. 78-5531....The difference between this instant case and Carmona V. Ward, supra is that here the highest state appellate court has already struck down the statute invoked.

The petitioner George Eddie Sam is entitled to a new sentencing trial, or a new penalty stage, under the cases that have been handed down by this court:

See: United States V. Jackson, 390 U.S. 570.

In the contrast to the facts here, there are other cases where mandatory sentences were imposed and each case is distinguishable from the facts here. See, for example Bordenkircher V. Hayes, 434 U.S. 357 and Corbitt V. New Jersey, 439 U.S.____, 99 S.Ct. 492; or see, Gardiner V. Florida, 430 U.S. 349 and last see, Presnell V. Georgia, 439 U.S.____, 99 S.Ct. 235. The above cases are instructive for the following reasons: Here, the "Mandatory" sentence 40 years (and modified to 25 years) were imposed as a result of an unconstitutional statute. This single factor distinguishes the Facts here from many of the above cases.

For all of these reasons this court is asked to grant certiorari and to thereafter grant the relief prayed for in the petitioner's Prayer for Relief.

VIII
Questions of Law #3 presented for Review

The trial court denied defendant due process of law when it refused to direct a verdict for the defendant because the evidence showed that defendant was entrapped as a matter of law. In the alternative, the defendant urges that the trial court's failure to give his requested instruction on entrapment when the issue was submitted to the jury, was denial of due process of law.

ARGUMENT

The uncontradicted facts as brought out in this case show that every conversation about narcotics held between the defendant and the police informant Kelly Oliver were at her instigation. There is not one conversation in which the defendant himself brought up the topic of drugs. It was Kelly Oliver who first suggested her need for something to keep her awake because of her heavy work schedule and her need to go to Oklahoma city to see her daughter. Her repeated pleas for some help from the defendant were met by him obtaining some amphetamines for her and giving them to her for the same price for which he had obtained them. It was on her further pleas that people were on her back and that she was in trouble and that she needed cocaine that the defendant arranged for her to get some cocaine. He testified that he kind of liked her, she seemed like a nice person, she was just alone and working down there trying to get along like everyone else, was having to hustle to make a few dollars, and she pleaded with him to obtain these items for her.

Testimony of Mr. Sam's nephew, Tommy Joe Sam, as well as the defendant's testimony, show repeated attempts by Kelly Oliver, the police

informant, to make contact with Mr. Sam. She would give messages to the nephew in an effort to get Mr. Sam to call her or to come by the bar where she worked. It seemed to Tommy Sam as if every time he saw her she was trying to get him to get George Eddie Sam to make contact with her.

As far as the cocaine transaction Kelly Oliver admitted that she initiated the discussion on narcotics. (Tr. 16). Prior to this time George Eddie Sam did not say he wanted to sell her any cocaine. (Tr. 17). She admitted that she may have told George Eddie Same, in attempting to get him to get her some cocaine, that she had gone on a trip to meet some suppliers but could not buy any cocaine and that she needed cocaine. (Tr. 20).

Mrs. Oliver testified that she first met Mr. Sam in March of 1976 at a bar. They had general conversation at that time but narcotics were not mentioned. The next time she saw him was about a month later at which time she initiated a conversation asking him if he thought he could get her some amphetamines. George Eddie Sam did not make any offer or initiate the conversation about the amphetamines (Tr. 22). She admitted that it very possibly was true that every time she talked to George Eddie Sam about drugs, or discussed or talked about drugs, it was always her calling and starting the conversation, or initiating it and talking him into selling drugs to her (Tr. 24). She was sure that she stated to him something very similar to the effect that she needed the amphetamines to keep her awake, because she had to make a trip to Oklahoma City and come back the next day and work the next night. She also admitted that she probably pleaded with him. (Tr. 30).

The evidence, thus, is uncontradicted that Kelly Oliver initiated every conversation about drugs and was always the one to request them from the defendant. The defendant never asked her if she wished to buy drugs and never initiated a conversation with her about drugs. The evidence showed that she played on the defendant's sympathies repeatedly, as well as hounded him continually about helping her to obtain drugs. There is no evidence whatsoever that the defendant had the predisposition to commit the crime of distribution of cocaine to her. Kelly Oliver was literally the defendant to help her out of tight spots. There was absolutely no evidence whatsoever presented to indicate that the defendant was engaged in the distribution of narcotics or that he had any intent to distribut narcotics before being induced to do so by Kelly Oliver.

In grate V. State, Okl. Cr., 529 P.2d 1001 the Court of Criminal Appeals held that it was entrapment as a matter of law where there was uncontradicted evidence that the undercover and his police informant originated the criminal design and implanted it in the mind of the defendant Grate who lacked the predisposition to commit the crime charged. In that case it was undisputed that the female police informer, while suffering withdrawal symptoms of heroin, begged the defendant Grate to find her some drugs. The undercover agent admitted that the defendant went out of his way to locate and deliver the drug to them. There was no evidence presented to indicate that the defendant Grate had been engaged in the distribution of heroin or that he had any intent to distribute heroin before being induced to do so by the suffering female police informer.

Entrapment as a matter of law was held to be present by this court and the judgment and sentence was reversed and remanded with directions to dismiss. At the close fx of the state's case the defendant entered his demurrer to the evidence and motion to dismiss which were overruled by the trial court. The defendant further moved for a directed verdict of acquittal at the close of the defendant's case which was also overruled. Defendant contends that this was error on the part of the trial court and that the court should have ruled as a matter of law that the defendant was entraped into distributing the cocaine to the female police informant, Kelly Oliver.

However, when the court had overruled the defendant's contention that entrapment as a matter of law was proven, the defendant proposed a requested instruction, defendant's requested instruction No. 1, which was refused by the trial court. This instruction, which was a large part of the defendant's defense, was that Kelly Oliver was the one who first suggested the commission of the criminal act. The instruction requested by the defendant stated:

> "The defendant has interposed as one of his defenses, the defense of entrapment. And in this connection, you are instructed that if you believe from the evidence that the officers, or those acting under them, first suggested the commission of the criminal act, or did first lure the accused into the commission of such act, then and in that event, it will be your duty to hold for the defendant and acquit him.
>
> However,, if you believe from the evidence that the first suggestion for the commission of the crime came from the defendant and that all of the essential xxxxxx acts constituting the crime were done by him, then the fact that the officers, or those acting under them, furnished an opportunity and lent aid in the commission of the offense less than the performing of some essential act constituting the offense, then, and in that event, the defense of entrapment would not apply."

It is fundamental that a trial court must instruct on all material issues raised and having some basis of support in the evidence. Perkins V. State, Okl. Cr., 492 P.2d 383. In the present case, the xxxxx exact instruction as proposed by the defendant was formulated by this very court in Beasley V. State, Okl. Cr., 282 P.2d 249, 254. Bealey has never been expressly overruled by this court. In Dupree V. State, Okl. Cr., 506 P.2d 974, 977, this court concedes that this identical requested instruction is a proper statement of the law. However, in that xx case, this court held that the requested instruction was substantially covered by the instructions given by the trial court.

The only instruction given on entrapment on this case was the court's instruction No. 5:

> "Ladies and gentlemen of the jury, the defendant, as one of his defenses herein, as pled entrapment. In this connection you are instructed that one who is instigated, induced, or lured by an officer of the law or other person, for the purpose of prosecution, into the commission of a crime which he had otherwise no intention of committing may avail himself of the defense of entrapment.

> Therefore, if you find that defendant was induced or lured by an officer of the law or other person for the purpose of prosecution, into the commission of a crime which he had otherwise no intention of committing, then in that event, it will be your duty to hold for the defendant and acquit him. Such defense is not available, however, where the officer or other person acted in good faith for the purpose of discovering or detecting a crime and merely furnished the opportunity for the commission thereof by one who had the requisite criminal intent.
>
> Accordingly, entrapment is not available as a defense to a person who has the intent and design to commit a xxxxxx criminal offense and who in fact does commit the essential acts constitution it, merely because an officer of the law, in his effort to secure evidence against such person, affords him an opportunity to commit the criminal act, or purposely places facilities in his way or aids and encourages him in the perpetation thereof, particularly or at least where the doing of the particular act is a crime regardless of the consent of anyone. However, the officers cannot employ extra-ordinary temptations or inducements to commit the crime.
>
> The principle of entrapment places no limitation on the right of officers to obtain evidence of any crime originating in the mind of another. He is not required to advise defendant at the time of the commission of the alleged offense that he is an undercover agent, nor is he required to tell the defendant that if defendant does sell him cocaine, the facts leading up to the sale and the sale itself will be used against him in a court of law; nor is he required to make an immeditate arrest, particularly if such an arrest would end a continuing undercover investigation, but a charge may be filed and an arrest made at the end of the undercover investigation."

This instruction, as given by the trial court, does not advise the jury of the defendant's defense that it was the police informant who first suggested the commission of the criminal act. See Beasley supra, Shouquette V. State, 25 Okl. Cr., 169, 219 P. 727; Warren V. State, 35 Okl. Cr., 430, 251 P. 101; Finley V. State, 84 Okl. Cr., 309, 181 P.2d 849; Rider V. State, 53 Okl. Cr., 393, 12 P.2d 552. Not only does this instruction fail to incorporate the requested instruction of the defendant, it overstated the prosecution's position and shifted the burden of proof to the defendant, thereby defeating the defense of entrapment. Such an instruction, then was obviously prejudicial to the defendant. As the Honorable Judge Brett stated in his dissenting opinion in Dupree supra, in analyzing an almost identical instruction:

> "The third paragraph of the court's instruction commenced: 'The principle of entrapment places no limitation on the right of officers to obtain evidence of any crime originating in the mind of another . . . . As a statement of law that is correct, but the purpose for the instruction is to place before the jury the issue, or issues, to be determined by the jury. Xxxx Whether or not the intent to commit the crime originated in defendant's mind was one of the issues to be determined by the jury. There was sufficient testimony before the jury to raise the issue of entrapment; and as the court of appeals stated in Notaro v. United States, 363 F.2d 169 (9th cir.-1966):

"The issue (of entrapment) having appeared, it becomes the prosecution's burden to establish beyond a reasonable doubt that the accused was not entrapped into the commission of the offense." At Page 175.

"Consequently I believe that the issue having been raised by the defendant, the jury was entitled to have had an instruction which merely placed before it the issues to be determined concerning the defense of entrapment, and not a discourse on the law of entrapment. Judge Learned Hand stated in United States V. Sherman, 200 F.2d 880 (2d Cir.-1952):

"In such cases of entrapment two questions of fact arise: (1) Did the agent or his confidential informant induce the accused to commit the offense charged in the indictment; (2) if so, was the accused ready and willing without persuasion and was he awaiting any propitious opportunity to commit the offense. On the first question the accused has the burden; on the second the prosecution has it." (Citations omitted)

"The third paragraph of the trial court's instruction went beyond the placing of the two issues before the jury, and must have left the impression that the court assumed the defendant had the required intent. Also, whether or not the undercover agent must advise the defendant he is an undercover agent is not contained in the issues to be considered; nor are the elements of the "Miranda Warnings' any part of the instruction. Consequently, the jury must have viewed the court's instruction, as requiring a finding of guilty, regardless of the fact that defendant may not have had any previous intent to sell marijuana. 'When a party has the burden of proof as to a factual issue, it cannot be proper that instructions pertaining to the issue are so vague or ambiguous as to permit of misinterpretation by the jury of the standard which is to be applied.'" Notaro V. United States, supra at 175.

"This court also stated in Colby V. State, 57 Okl. Cr., 162, 46 P.2d 377 (1935): "The trial court is never warranted in giving an instruction which has the effect of determining contraverted questions of fact." Dupree supra at 981, 982.

The defendant contends that his requested instruction would have cured the error in the instruction by the trial court. As this court has held in Carter V. State, Okl. Cr., 507 P.2d 932 at 934:

"The defendant's requested instruction relative to his theory of defense, which as we have said was a material issue, was refused by the trial court. The court's instructions did not otherwise cover this issue or theory of defense. It is fundamental that the trial court must instruct on all material issues raised and having some basis of support in the evidence. Even if the trial court does not agree with the particular language of such instructions, the court should correct it and give it proper form, if he has not otherwise instructed on that issue; and after such request it is error for him to fail or refuse to give an instruction upon such issue. Roberson V. United States, supra. 4 Okl. Cr., at 237, 111 P. at 984."

II

QUESTIONS OF LAW PRESENTED

Defendant was prejudiced and Denied a Fair Trial and Due Process of Law by the Improper Cross Examination of HIM by the prosecutor and by the improper Closing Argument of the prosecutor.

ARGUMENT

During cross-examination of the defendant by the prosecutor, the prosecutor repeatedly asked the defendant incompetent questions on collateral matters with the intent of insinuating other crimes by the defendant which hadd not and court not be proven:

"Q. You and Kelly Oliver had a number of discussions and mettings, didn't you?

A. Yes.

Q. On one occasion did you tell her you also dealt in heroin?

A. No.

Q. Didn't you have one conversation with her in which you talked with Kelly Oliver ~~kx~~ and tried to talk her into transporting a large amount of narcotics to Kansas for you?

A. No.

Q. On one occasion did you tell Kelly Oliver that you dealt in large amounts of cocaine and marijuana?

A. No.

Q. Isn't it a fact that on one or more ocassions you TRIED to set up large dope deals with other people?

A. No, I don't remember ever doing that. (Tr. 66).

The defendant contends that such conduct on the part of the prosecutor denied him his right to a fair and impartial as guaranteed to him by the constitution of the United States, Amendment Six, and the Constitution of the State of Oklahoma, Article Two Section Twenty. This court in Neely V. State, Okl. Cr., 61 P.2d 741, 743 stated:

"The Court has often held that it was improper for the county attorney to propound questions to witnesses on cross-examination indicating the defendant has committed other crimes unless he follows it up by offering proof tending to establish the facts he had inquired of the witness on cross-examination, and which had been denied by the witness.

* * *

"In Appleby V. State, 11 Okl. Cr., 284, 146 P. 229, this court in part said: 'The repeated asking of incompetent questions, which clearly have for their purpose the intimation of something to the jury that is either not true or not capable of being proven if true, is wrong, and such conduct of counsel is not cured because the court sustains objections to the questions.'

" Further on the court said: 'In jury trials incalculable harm is often done by counsel in asking known incompetent questions in the hearing of the jury and thereby forcing the adverse party to object to them also in the hearing of the jury, which manifests a fear of the incompetent questions, and gives emphasis to the harmful matter they are supposed to contain." Neely at 743.

In Syllabus No. 2 of Love V. State, Okl. Cr., 360 P.2d 954, 955 this court reiterated that the prosecutor can do harm to a defendant and prejudice him in the eyes of the jury by asking questions which he knows he cannot show by other evidence, and which would prejudice the defendant if the defense attorney interjected with an objection:

"Prosecutors should refrain from propounding questions which have for their purpose insinutations or inferences of evidence that cannot be proven or would be inadmissible, as incalculable harm is often done by counsel in asking such questions within hearing of the jury and thereby forcing the adverse party to object to them in the presence of the jury, which manifests a fear of the incompetent question, and gives emphasis to the harmful matters they are supposed to contain."

This Court has held that such prejudicial conduct by a prosecutor, if not grounds for reversal, is at least grounds for modification of the sentence as being harmful and prejudicial to the defendant. In Mitchell V. State, Okl. Cr., 523 P.2d 1102, the court held that the conduct of the prosecutor was not reversible error, but was modifiable error. In Neely supra, the court reversed and remanded because of the conduct of the prosecutor on his cross-examination. Defendant contends that the errors committed by the prosecutor on cross-examination of the defendant are at least modifiable error if not reversible error.

In his closing argument the prosecutor further compounded the error. He began to explain to the jury how cases are xxx process before they ever get to a jury:

"These cases come into our office, brought to us by law enforcement personnel, and we have to exercise our discretion with those cases, with regard to those case, and when we do file these cases and take them through the preliminary hearings, and all the motions and take it before a jury, we have burdened a great many people with a problem that was initially ours alone, and we do so with a great deal of reserve. I think we try to be as conservative as we can in imposing dispose of them ourselves, but there are cases, however, that demand that we seek the help of a judge and jury, and this is one of those cases. (Tr. 78-79).

"A person, who, for example, is standing there on the street for example, and a law officer comes up and by actual ordinary pressure, by influence and manipulation, that is not condoned under the law to entrap that man into a crime for the purpose of convicting him, and it is totally unbeknownst to him, and a total surprize to him, and that would be entrapment, and that is something our office will not tolerate. There is no reason for this to become as ruthless or as despicable as that, and that would be disregard for the law and for the constitutional protection that should be extended to every citizen. I would hope, and I will do everything I can to see that law enforcement maintains the highest standards of obedience to the law and I would never bring a case to the jury based on police impropriety or illegal behavior. I don't think we have that kind of case here." (Tr. 82-83).

It is improper for prosecuting attorneys to repeatedly ask incompetent questions and to state their own personal opinions in closing argument. McKinnon V. State, Okl. Cr., 229 P.2d 535. Yet, this is exactly what the prosecutor did in this case. He told the ladies and gentlemen of the jury that he would not have even brought this case to them if he did not believe the defendant was guilty. It is further improper in closing argument to present facts not pertinent to the issues and which are not in evidence, Pry V. State, Okl. Cr., 218 P.2d 643. Again, this is what the prosecutor did.

In the present cas e the prosecutor was telling the jury that he in his own opinion thought that the defendant was xxxxx guilty, not that he thought that the evidence showed the defendant was guilty. This has been condemned in Holleman V. State, Okl. Cr., 125 P.2d 239. Because of the cross-examination of defendant by the prosecution and because of the comments made by the prosecutor in his closing argument, the defendant was denied his right to a fair and impartial trial and was prejudiced in the eyes of the jury and thus his case should be reversed.

X
QUESTION OF LAW #5 PRESENTED

The proof of the two former convictions was not sufficient, Jackson V. Virginia U.S. No. 78-5283 (Jun. 1979).

ARGUMENT

During the second stage of the trial, and after the defendant had been convicted of the crime of distribution of cocaine, the second stage of the trial commenced. At that time the prosecutor offered for identification purposes and as evidence court clerk's certificates from Illinois in two cases. These court clerk's certificates reflected that on June 5, 1967 George Eddie Sam was convicted of burglary in the District Court of Woodford County, Eureka, Illinois in Case No. 67-CR-4. The other court clerk's certificate xxxxx reflected that George Eddie Sam was convicted for burglary in the District Court of McLean County, Bloomington, Illinois in Case No. 69-CR-645. This was the sole and only proof in the second stage of the trial as to the alleged former convictions of the defendant.

In Pearce V. State, Okl. Cr., 456 P.2d 630 this court held in syllabus No. 1 at 631:

"Proof of former conviction cannot be sufficiently proved by offering only the certificate of the trial judge and certificate of the court clerk from county in another state in which the conviction was alleged to have occurred."

In the pearce case at the conclusion of the first stage of the trial the jury returned a verdict of guilty. In the second stage the district attorney attempted to prove defendant's former convictinn by introducing the "Certificate" of the judge of Sedgwich County, Kansas, and the "Certificate" of the court clerk for Sedgwich county, Kansas. On the basis of this proof the jury returned a verdict of guilty to the charge of robbery with firearms after former conviction of a felony. The attorney general in Pearce confessed error in that the proof of the defendant's former convictinn was not sufficient to sustain the charge in the second stage of the proceeding. In Pearce the jury had originally sentenced the defendant to a term of 30 years in prisonment on the charge of armed robbery after foremer conviction of a felony. This court modified that sentence to a term of 10 years imprisonment.

Although in the first stage of this trial the defendant admitted to 2 felony convictions, and that counsel went to court with him on 1 on them, there is nothing in the record to show that the 2 purported judgments and sentences or "Certificates of court clerk" that were introduced by the prosecutor were for the same convictions admitted by the defendant. The foremer convictions relied upon must be those alleged in the information, and thus the evidence is insufficient to prove the foremer convictions in the second stage of the trial. The defendant's motion to dismiss in the nature of a demurrer to the sufficiency of the evidence as well as defendant's motion for a directed verdict of acquittal on the second stage of the trial were overruled by the trial court. This was purely error because the foremer convictions were not sufficiently proved. See, Jackson V. Virginia__U.S.___, No. 78-5283.

XI
PRAYER FOR RELIEF

The petitioner George Eddie Sam prays this court will (1) grant a writ of certiorari to review the final judgment No. F-77-621 of the Oklahoma Court of Criminal Appeals; (2) appoint an attorney to represent the petitioner in this court; (3) hold oral arguments, and (4) vacate the final judgment No. F-77-621 of the state court with instructions to grant petitioner a new trial or alternatively, vacate the petitioner's 25 years and thereafter to allow the petitioner an opportunity to be heard at a new penalty trial prior to the imposition of any new sentence.

XII
CONCLUSION

Wherefore the petitioner prays that the court will grant relief as set out in the petitioner's prayer for relief. IT IS SO PRAYED.

Respectfully Submitted,

/s/ George Eddie Sam

George Eddie Sam #94459
P.O. Box 97
McAlester, Oklahoma 74501

XIII
AFFIDAVIT OF POVERTY

STATE OF OKLAHOMA)
COUNTY OF PITTSBURG) ss

George Eddie Sam, depose and say under oath that he is a poor person and unless this court grants leave to proceed herein as a poor person, I George Eddie Sam will be unable to proceed.

/s/ George Eddie Sam

Subscribed and Sworn to before me this 25TH day of July, 1979.

Notary Public Frank Mercurio

My Commission Expires: Oct 6, 1982

VERIFICATION

George Eddie Sam, after being first sworn under oath affirms that the above petition for writ of certiorari is true and correct to the best of his knowledge, belief and memory.

/s/ George Eddie Sam
Affiant

Subscribed and Sworn to before me this 25th day of July, 1979.

Notary Public Frank Mercurio

My Commission Expires: Oct 6, 1982

PROOF OF SERVICE

On July 26, 1979, I mailed a copy of the above instrument to the attorney general of Oklahoma Hon. Jan Eric Cartwright - 112 State Capitol Building, Oklahoma City, Oklahoma 73105.

/s/ George Eddie Sam
Petitioner

Exhibit #1

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GEORGE EDDIE SAM,)
Appellant,)
-vs-) No. F-77-621
THE STATE OF OKLAHOMA,)
Appellee.)

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
MAR 27 1979
Ross N. Lillard, Jr.
CLERK

AUTHORIZED FOR FILING
MAR 27 1979
COURT OF CRIMINAL APPEALS

- O P I N I O N -

CORNISH, Presiding Judge:

The appellant, George Eddie Sam, was convicted of Delivery of a Controlled Drug, After Former Conviction of a Felony, in Muskogee County, and was sentenced to forty (40) years' imprisonment.

On June 24, 1976, the appellant met an undercover narcotics agent in a local cafe and sold the agent a packet of white powdery substance, which was later shown to be cocaine. The appellant raised entrapment as a defense.

In urging reversal or modification of his sentence, the appellant first contends it was error for the trial court to instruct under 21 O.S.Supp.1976, § 51(B), since it was held to be unconstitutional in Thigpen v. State, Okl.Cr., 571 P.2d 467 (1977). This Court said therein, at page 471:

> "We are of the opinion that it was the legislative intent in enacting the provisions of 21 O.S. Supp.1976, § 51(A) and § 51(B), to authorize progressively greater punishments for habitual criminals; Section 51(B), however, is so vague and illusory when construed with Section 51(A) that it cannot be construed in such a manner as to implement the legislative intent, and because of its vagueness and demonstrated defects we are of the opinion that 21 O.S.Supp.1976, § 51(B), is unconstitutional . . . ." (Footnote omitted)

We agree such error requires a modification of the sentence in the case at bar, however, as in Thigpen v. State, supra, such error does not require reversal. Since part A of 21 O.S.Supp.1976, § 51, was severable from part B and has not been held to be unconstitutional, it must be applied in the instant case.

Appellant then argues that since the jury recommended the minimum sentence allowable under Section 51(B) his sentence should be modified to the minimum sentence allowable under Section 51(A).[1] No citation of authority is given to support this proposition. Furthermore, appellant fails to note that the sentence under Section 51(B) was a fixed sentence which required that:

> "Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable, had it been a first offense; . . ."

The appellant also ignores the legislative intent behind the Habitual Offender's Act as stated in Thigpen v. State, supra; that is, "[T]o authorize progessively greater punishments for habitual criminals; . . ." This Court, therefore, applies 21 O.S.Supp.1976, § 51(A), and modifies the sentence from forty (40) years' imprisonment to a term of twenty-five (25) years' imprisonment.

The appellant's second assignment of error is the trial court's refusal to direct a verdict for the appellant because the evidence showed that he was entrapped as a matter of law. In the alternative, the appellant assigns as error the trial court's failure to give his requested instruction on entrapment when the issue was submitted to the jury.

As in Riddle v. State, Okl.Cr., 373 P.2d 832 (1962), the evidence of entrapment presented a close question of law. This Court finds the tenth paragraph of the Syllabus in Riddle to be

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[1] Title 21 O.S.Supp.1976, § 51(A), ¶ 1, provides:

> "A. Every person who, having been convicted of any offense punishable by imprisonment in the penitentiary, commits any crime after such conviction is punishable therefor as follows:
>
> "1. If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the penitentiary for any term exceeding five (5) years, such person is punishable by imprisonment in the penitentiary for a term not less than ten (10) years."

controlling in this case, wherein the Court stated:

> "Whether a defendant has been entrapped is to be determined by the jury, unless it can be decided as a question of law upon undisputed facts sufficient to establish entrapment. Where there is a conflict in the testimony the court does not err in refusing defendant's request for a directed verdict if submitted to jury with proper instructions."

See also Escobedo v. State, Okl.Cr., 545 P.2d 210 (1976), and Kissick v. State, Okl.Cr., 504 P.2d 889 (1972). Conflicting testimony was presented in the instant case as to the coercion necessary to convince the appellant to obtain the drugs for the State's witness. Thus, the resolution of the question of entrapment on such conflicting evidence was a factual question for the jury.

Appellant's reliance on the case of Grate v. State, Okl.Cr., 529 P.2d 1001 (1974), in which this Court found entrapment of the defendant as a matter of law, is misplaced. In Grate, the trial testimony revealed that the defendant was reluctant to make the drug purchase and, in fact, advised the buyer against use of the drugs in question. Furthermore, the evidence reflected the defendant had no prior convictions for anything other than traffic offenses.

In the case at bar, although the appellant did not initiate the discussion with the undercover narcotics agent concerning the purchase of drugs, he did not object to her requests nor attempt to convince the undercover agent to leave the cocaine alone. In addition, there was evidence presented at trial that in April or May, 1976, the agent asked the appellant if he could obtain some amphetamines for her, which he ultimately procured and sold to her at an agreed price. Therefore, after a thorough examination of the evidence, we cannot say that entrapment was so positively established as to be a matter of law. For this reason, the question of entrapment was properly submitted to the jury, and the trial court did not err in failing to sustain the appellant's motion for a directed verdict.

We next consider the propriety of the trial court's refusal to submit the appellant's requested instruction on entrapment to the jury and the submission by the court of its own instruction.

The appellant's primary objection to the court's instruction is that it failed to apprise the jury that if "officers or those acting under them first suggested the commission of the criminal act," then the appellant was entrapped.

It is to be noted that the appellant's requested instruction was identical to the instruction which was denied by the trial court in Dupree v. State, Okl.Cr., 506 P.2d 974 (1973). On appeal in Dupree, this Court affirmed the trial court's refusal to give the requested instruction and the submission of its own instruction, although conceding the requested instruction was a proper statement of the law. We also note the instruction submitted to the jury in Dupree was substantially the same instruction as was submitted by the trial court in the case at bar. And as in that case, we are of the opinion that the trial court's instruction contains a clear and correct statement of the law of entrapment. We hold the refusal of the appellant's instruction was not error, since the requested instruction was substantially covered in the instruction given by the court. See Bunn v. State, Okl.Cr., 561 P.2d 969 (1977), and Owens v. State, Okl.Cr., 438 P.2d 21 (1968).

The appellant's third assignment of error is that he was prejudiced by statements of the prosecutor during cross-examination and in closing arguments. It is the general rule in Oklahoma that objections must be timely made in order to preserve errors for appeal. See Gaines v. State, Okl.Cr., 568 P.2d 1290 (1977). The record reflects no objection was made by the appellant to either the prosecutor's cross-examination or the closing argument. We also note the errors asserted were not contained in either the Motion for New Trial or Petition in Error. Finding no fundamental error in the remarks of the prosecutor and no timely objection, this argument cannot now be raised for the first time on appeal. Therefore, the appellant's third assignment of error is without foundation.

The appellant's fourth assignment of error concerns the second stage of the bifurcated proceedings. The State submitted as evidence two certified copies of judgments and sentences showing

that a person with the identical name as the appellant had previously been convicted of felonies. The testimony and the admissions of the appellant's prior convictions were also submitted as evidence by the prosecution. No evidence or rebuttal testimony was offered by the appellant during this second stage. The appellant first demurred to the evidence as being insufficient. When that motion was overruled, he moved for a directed verdict which was also overruled. The appellant asserts that the overruling of these motions by the trial court was error.

Both the appellant and the State would agree that the certificates alone would be insufficient to support a finding that the appellant had been formally convicted of felonies in another state. See Pearce v. State, Okl.Cr., 456 P.2d 630 (1969). The State contends, however, that the testimony from the first stage of the proceedings was admitted as evidence in the second stage, and that this testimony, combined with the certificates, was sufficient.

This Court is not convinced that the trial court admitted the testimony from the first proceedings as evidence, and if it did, it was not made clear by the State that the admissions of the appellant in the first stage were of the same convictions evidenced by the certificates admitted in the second stage. This Court also fails to agree that the certificates alone were insufficient proof of the prior convictions. Reference must be made to 12 O.S.1971, § 485, which provides for authentication of the copies of foreign court records. See Anglin v. State, Okl.Cr., 508 P.2d 679 (1973). Applying the provisions of this Section to the case at bar, this Court finds that the two copies of the judgments and sentences which the State submitted as evidence, were properly certified and as such, were sufficient to prove the appellant's prior felony convictions.

Both appellant and the State cite Pearce v. State, supra, for the proposition that certificates alone are insufficient. It is not clear in that case that the certificates were properly certified as required by the Oklahoma Statute indicated above.

Furthermore, it is unclear whether the certificates indicated that the judgments were final and whether an appeal had been taken therefrom. Pearce is therefore distinguishable and not controlling. In the case at bar, the judgments and sentences were coupled with court clerk certificates which certified that the appellant had not appealed, that he was represented by counsel, and that the judgments were final.

We note with favor the decision in Louder v. State, Okl.Cr., 568 P.2d 344 (1977), which provided that where the name of the defendant and the name of the person on the certified copy of the judgment and sentence are identical and the defendant fails to offer evidence in his behalf, the State has met its burden of proof that the defendant was one and the same as the defendant named on the judgment and sentence from another court. We, therefore, find that the evidence offered by the State was sufficient for finding that the appellant had been formally convicted of two previous felonies.

Finding no error which would justify a reversal and for the reasons set forth above, the judgment and sentence is MODIFIED from forty (40) years to a term of twenty-five (25) years' confinement in the State penitentiary, and as MODIFIED the judgment and sentence is AFFIRMED,

AN APPEAL FROM THE DISTRICT COURT, MUSKOGEE COUNTY, OKLAHOMA,
HONORABLE WILLIAM H. BLISS, JUDGE

GEORGE EDDIE SAM, appellant, was convicted of the offense of Delivery of a Controlled Drug, After Former Conviction of a Felony; was sentenced to forty (40) years' imprisonment, and appeals. Judgment and sentence MODIFIED to twenty-five (25) years' imprisonment and otherwise AFFIRMED.

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OPINION BY CORNISH, P. J.
BRETT, J., DISSENTS
BUSSEY, J., CONCURS

BRETT, J.: Dissents.

I respectfully dissent to this decision for the same reasons I stated in Dupree v. State, Okl.Cr., 506 P.2d 974 (1973), commencing at page 978. Further, I believe the conduct of the prosecutor was improper in his cross-examination of defendant and in his closing argument. Therefore, I would reverse and remand this conviction for a new trial.

Exhibit #

FILED
COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
APR 27 1979
Ronald L. Lillard, Jr.
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

GEORGE EDDIE SAM,	]	
	]	
Appellant,	]	
	]	
-vs-	]	No. F-77-621
	]	
THE STATE OF OKLAHOMA,	]	
	]	
Appellee.	]	

- ORDER DENYING PETITION FOR REHEARING -
AND ISSUANCE OF MANDATE FORTHWITH

NOW, on this 23rd day of April, 1979, the Court having examined the Petition for Rehearing and being fully advised in the premises, finds that the Petition for Rehearing should be, DENIED.

IT IS THE FURTHER ORDER of this Court that the Clerk of this Court is directed to issue the mandate forthwith.

WITNESS OUR HANDS, and the Seal of this Court, this 27th day of April, 1979.

TOM R. CORNISH, PRESIDING JUDGE

HEZ J. BUSSEY, JUDGE

ATTEST:

CLERK

No. 79-5145

Supreme Court, U. S.
FILED
OCT 22 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

GEORGE EDDIE SAM,

Petitioner,

-vs-

THE STATE OF OKLAHOMA,

Respondent.

RESPONSE BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

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October, 1979

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

GEORGE EDDIE SAM,)
)
Petitioner,)
)
v.) No. 79-5145
)
THE STATE OF OKLAHOMA,)
)
Respondent.)

BRIEF OPPOSING CERTIORARI

COMES NOW Jan Eric Cartwright, Attorney General for the State of Oklahoma, by and through Janet L. Cox and Ronald Lee Johnson, Assistant Attorneys General, and on behalf of the State of Oklahoma and for answer to the Petition for Writ of Certiorari submits to this Honorable Court the following Brief in opposition thereto.

I.

JURISDICTION

Petitioner Sam seeks review pro se by way of Petition for Writ of Certiorari from the Oklahoma Court of Criminal Appeals. On the 27th day of March, 1979, the aforesaid Court entered its Order modifying Sentence and affirming the conviction rendered in the District Court of Muskogee County, State of Oklahoma, on the 2nd day of March, 1977.

II.

STATEMENT OF CASE

Petitioner, George Eddie Sam, hereinafter refered to as "defendant," was charged by Information in Case No. CRF-76-248 with the crime of Delivery of a Controlled Drug (cocaine) After Former Conviction of a Felony in the District Court of Muskogee County, State of Oklahoma. The defendant was tried by a jury and represented by counsel. The jury returned verdicts of guilty in both stages of the trial wth punishment set at forty (40) years imprisonment under the control of the State Department of Corrections. The trial court sentenced the defendant in accordance with the jury verdict. On direct appeal the Oklahoma Court of Criminal Appeals affirmed the conviction but modified the term of punishment from forty (40) years to twenty-five (25) years imprisonment,

denying defendant's petition for rehearing on the 27th day of April, 1979. Defendant petitions this Honorable Court for a Writ of Certiorari to review the final judgment dated April 27, 1979.

III.

STATEMENT OF FACTS

This matter came on for jury trial the 14th day of February, 1977, before the Honorable William H. Bliss, District Judge. The State called as its first witness Ms. Oliver, an investigator for the District Attorney's office, who testified that at her request the petitioner sold her a white powdery substance (cocaine) for $110 (Tr. 12). Her testimony on cross-examination was not controverted. On redirect, it was established that she did not use undue invluence on the petitioner to procure the drugs (Tr. 26).

The State then called Muskogee police officer Bratt who testified that he was working with Ms. Oliver. He further testified that on June 24, 1976, he gave her $110 to purchase a gram of cocaine. He stated that Ms. Oliver then went to the rendevous place to meet the petitioner to transact the "buy" and 30 minutes later she came out. Thereafter, they went to his apartment where Ms. Oliver turned over the evidence. The evidence was placed in the police evidence locker and later released to the District Attorney's office. There was no cross-examination (Tr. 37-39).

The State's next witness was Gerald Belyer, a forensic chemist for the Oklahoma State Bureau of Investigation, who testified that he had examined the evidence (white powdery substance) and it contained 1.1 grams of cocaine (Tr. 40-43).

The State then rested after it introduced the cocaine into evidence (Tr. 44, 45).

The defense then called the defendant, George Eddie Sam, who admitted to having pleaded guilty to burglary on two prior ocassions while he was living in Illinois (Tr. 48-51). The defendant further described his relationship with Ms. Oliver, admitting that he had sold her approximately 200 pills in addition to the cocaine he delivered and distributed to her on June 24, 1976 (Tr. 52-58, 71).

Tommy Joe Sam, the defendant's nephew, was the next to testify, stating that he had given his uncle messages from Ms. Oliver (Tr. 71-74). There was no cross-examination, and the defense rested its case.

The State then made its closing arguments wherein it rechanted the evidence as had been developed at trial, inclusive of the jury instructions (Tr. 78-89). The record reveals that the only objection made during the State's closing argument was with reference to an inference of the defendant's propensity to sell drugs. The objection was sustained and the prosecution went on to other ground (Tr. 89-92).

Thereafter, the defense made its closing argument. It was intimated that the evidence presented was insufficient to support a verdict of guilty. Further, the defense pleaded entrapment as its only valid defense (Tr. 93-100).

After the State's arguments in rebuttal (Tr. 100-102), the jury retired to deliberate and returned a verdict of guilty (Tr. 103, 104).

Subsequently, the second stage of the trial proceeded wherein the State introduced, without objection, Court Clerk's Certificates from the State of Illinois reflecting judgment and sentence of final felony convictions. The exhibits were admitted into evidence and the State rested (Tr. 109).

The defense then moved for dismissal of the case, specifically to the After Former Conviction charges, alleging the State failed in its burden of proof. The Court overruled the Motion, whereupon the defense moved for a directed verdict. The case was submitted to the jury, who set punishment at forty (40) years (Tr. 116).

Thereafter, the defense moved for a new trial which was overruled (Tr. 127).

IV.

QUESTIONS PRESENTED

1. Whether the trial court's instruction to the jury as to the imposition of punishment based upon an unconstitutional provision of the Oklahoma Habitual Criminal Act, 21 O.S. Supp. 1976,

§ 51(b), constituted a violation of the Due Process clause of the Fourteenth Amendment.

2. Whether the Oklahoma Court of Criminal Appeals' action modifying the Judgment and Sentence imposed by the trial court under the unconstitutional provisions of 21 O.S. Supp. 1977, § 51(b) constitutes a violation of the equal protection clause of the Fourteenth Amendment.

3. Whether the trial court's refusal to direct a verdict for the petitioner based on the contentions of entrapment as a matter of law and the court's refusal to instruct the jury on the petitioner's requested instruction of entrapment constituted a denial of due process of law.

4. Whether misconduct by the prosecutor on cross-examination and in closing argument denied petitioner a fair trial and due process of law.

5. Whether the petitioner was denied due process of law where the respondent submitted certified copies of Judgment and Sentence to secure a conviction of guilty After Former Conviction of a Felony in Another Jurisdiction.

ARGUMENT AND AUTHORITY

PROPOSITION I

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT WHERE THE OKLAHOMA COURT OF CRIMINAL APPEALS MODIFIED THE SENTENCE BASED UPON JURY INSTRUCTIONS GIVEN PURSUANT TO AN UNCONSTITUTIONAL PROVISION OF THE OKLAHOMA HABITUAL CRIMINAL ACT.

Petitioner urges that he is entitled to a new sentencing trial or a new penalty stage and cites decisions of this Court as authority for his position as follows:

> United States v. Jackson, 390 U.S. 50, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968);
>
> Bordenkircher v. Hayes, 434 U.S. 357, 98 S. Ct. 663, 54 L. Ed. 2d 64, reh. denied, 435 U.S. 918, 98 S. Ct. 1477, 55 L. Ed. 2d 511;
>
> Presnell v. Georgia, ___ U.S. ___, 99 S. Ct. 235, 58 L. Ed. 2d 207 (November 6, 1978).

As Mr. Sam noted in his Petition for Certiorari at page 13, "each case is distinguishable from the facts here." Respondents would

agree that the above-cited cases fail to shed any light on the issue of due process under the facts of the instant case.

Title 22 O.S. 1971, § 1066, allows the appellate courts of the State of Oklahoma to modify sentences. While in some jurisdictions the petitioner's case might have had to be remanded for a new second stage trial, in Oklahoma it is not necessary and is not a violation of due process. See Drennan v. State of Oklahoma, Okl.Cr., 581 P.2d 901 (1978), cert. denied, No. 70-1250 (December 4, 1978).

At the time of trial in this case, Section 51(b) had not been declared unconstitutional. However, upon review by the Oklahoma Court of Criminal Appeals, in the exercise of its inherent authority and in view of the decision of Thigpen v. State, Okl.Cr., 571 P.2d 467 (1977), the Court modified the initial term of forty (40) years to a term of twenty-five (25) years.

Respondent submits that the Due Process Clause of the Fourteenth Amendment affords an accused certain procedural safeguards in order to ensure a fair and impartial trial. The instruction by the court concerning the imposition of punishment pursuant to § 51(b) did not affect the initial finding of guilt by the jury. It is submitted that the modified sentence is well within the accepted realm of punishment for crimes of this nature; and, in light of the inherent authority of the appellate court to act, Petitioner's claim of a denial of due process falls exceedingly short of the procedural safeguards expounded by the United States Constitution.

In addition, Respondents submit that there exists no vehicle in the State of Oklahoma whereby Mr. Sam may be resentenced at a "new penalty stage" in the District Court. The jury assessed punishment after hearing testimony reflecting the facts of the case. A "new penalty stage" in effect would require a new criminal trial in its entirety.

It is further clear that should punishment be reimposed in accordance with 21 O.S. Supp. 1976, § 51(a), a term of imprisonment could be assessed against Mr. Sam from ten (10) years to life, resulting in a concededly greater punishment than the forty (40) years he received.

It is, therefore, respectfully submitted that Mr. Sam's allegations of a denial of due process falls exceedingly short of raising a fundamental constitutional issue upon which relief may be granted by this Honorable Court.

PROPOSITION II

PETITIONER WAS NOT DENIED EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT WHERE THE OKLAHOMA COURT OF CRIMINAL APPEALS MODIFIED THE TERM OF PUNISHMENT IMPOSED BY THE TRIAL COURT BASED UPON A STATUTE THAT WAS SUBSEQUENTLY DECLARED UNCONSTITUTIONAL.

In essence, Mr. Sam contends that he was denied equal protection of the law as a result of being sentenced at the trial level pursuant to 21 O.S. Supp. 1976, § 51(b). The aforesaid statutory provision was declared unconstitutional by the Oklahoma Court of Criminal Appeals in the decision of Thigpen v. State, supra, wherein the Oklahoma Court determined in its opinion that § 51(b) was ambiguous and defeated the obvious intent of the Legislature to authorize progressively greater punishment for habitual criminals.

In declaring § 51(b) unconsitutional, the Court was faced with the problem of what punishment should be assessed in those cases where the trial court had instructed under § 51(b).

Inasmuch as 21 O.S. Supp. 1976, § 51 contained a severability clause, the remaining provisions, specifically § 51(a), were not impaired. Title 21 O.S. § 51(a), left intact by the Oklahoma Court in Thigpen, reads:

> "Every person who, having been convicted of any offense punishable by imprisonment in the penitentiary, commits any crime after such conviction is punishable therefor as follows:
>
> "1. If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the penitentiary for any term exceeding five (5) years, such person is punishable by imprisonment in the penitentiary for a term of not less than ten (10) years.
>
> "2. If such subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in the penitentiary for five (5) years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding ten (10) years.

> "3. If such subsequent conviction is for petit larceny, or for any attempt to commit an offense which, if committed, would be punishable by imprisonment in the penitentiary, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding five (5) years."

Thus, in reviewing cases subsequent to Thigpen, supra, the Oklahoma Court of Criminal Appeals has taken one of two approaches in reviewing the assessed punishment. The first approach has resulted in a modification of sentence in the "interest of justice." Lee v. State, Okl.Cr., 572 P.2d 260 (Nov. 9, 1977).

The second approach is reflected in the decisions of Kitchens v. State, Okl.Cr., 576 P.2d 775 (March 27, 1978), and Barrett v. State, Okl.Cr., 573 P.2d 1221 (January 25, 1978). In these cases, no modification of sentence was made since the sentence imposed was clearly permissable and within the provisions of 21 O.S. Supp. 1976, § 51(a), which would have been the proper statute for sentencing the twice previously convicted defendants. Further, the Court found no prejudicial errors in these cases as in the Lee case, supra, which required modification of the sentence.

However, it is this alleged "ad hoc" approach taken by the Oklahoma Court of Criminal Appeals subsequent to Thigpen, supra, which apparently forms the basis of Petitioner's claim of a denial of equal protection under the Fourteenth Amendment.

The inherent power of the Court of Criminal Appeals to modify sentences on appeal is clearly authorized under the statutory provisions of the laws of the State of Oklahoma. Title 22 O.S. 1971, § 1066, states:

> "The appellate court may reverse, affirm or modify the judgment appealed from, and may, if necessary or proper, order a new trial. In either case, the cause must be remanded to the court below, with proper instructions, and the opinion of the Court within the time, and in the manner to be prescribed by rule of the Court."

The Oklahoma Court has consistently exercised its right to correct or modify sentences on appeal for a myriad of reasons. Such action has repeatedly been upheld. See Carbray v. State, Okl.Cr., 435 P.2d 188 (1967), cert. denied, 392 U.S. 916 (1968).

In the case at bar, the Court of Criminal Appeals reviewed all the testimony and found no errors requiring reversal of the sentence.

In modifying Petitioner's term of imprisonment, the Oklahoma Court of Criminal Appeals stated it its opinion:

> "Appellant then argues that since the jury recommended the minimum sentence allowable under Section 51(B) his sentence should be modified to the minimum sentence allowable under this proposition. Furthermore, appellant fails to note that the sentence under Section 51(B) was a fixed sentence which required that:
>
> > "'Every person who, having been twice convicted of felony offenses, commits a third, or thereafter, felony offenses within ten (10) years of the date following the completion of the execution of the sentence, shall be punished by imprisonment in the State Penitentiary for a term of twenty (20) years plus the longest imprisonment for which the said third or subsequent conviction was punishable had it been a first offense; . . .'
>
> "The appellant also ignores the legislative intent behind the Habitual Offender's Act as stated in Thigpen v. State, supra; that is, '[T]o authorize progressively greater punishments for habitual criminals; . . .' This Court, therefore applies 21 O.S. Supp. 1976, § 51(A), and modifies the sentence from forty (40) years' imprisonment to a term of twenty-five (25) years' imprisonment.
>
> "In urging reversal or modification of his sentence, the appellant first contends it was error for the trial court to instruct under 21 O.S. Supp. 1976, § 51(b), since it was held to be unconstitutional in Thigpen v. State, supra. This Court said therein, at page 471:
>
> > "'We are of the opinion that it was the legislative intent in enacting the provisions of 21 O.S. Supp. 1976, § 51(A) and § 51(B), to authorize progressively greater punishments for habitual criminals; Section 51(B), however, is so vague and illusory when construed with Section 51(A) that it cannot be construed in such a manner as to implement the legislative intent, and because of its vagueness and demonstrated defects we are of the opinion that 21 O.S. Supp. 1976, § 51(B), is unconstitutional . . . .' (Footnote omitted)
>
> "We agree such error requires a modification of the sentence in the case at bar, however, as in Thigpen v. State, supra, such error does not require reversal. Since part A of 21 O.S. Supp. 1976, § 51, was severable from part B and has not been held to be unconstitutional, it must be applied in the instant case."

Petitioner falls within that class of cases where punishment was imposed under a section of the Habitual Criminal Act subsequently determined invalid, but which did not impair the remaining provisions of the Act. Within that class of cases, the Oklahoma Court of Criminal Appeals has exercised its inherent power, on a case by case basis, to correct sentence through modification.

It is equally well established that federal appellate courts are without power to control or modify a sentence which is within the limits fixed by a valid statute unless clearly excessive. In Hayes v. United States, 238 F.2d 318, 322, cert. denied, 353 U.S. 83, 77 S. Ct. 1280, 1 L. Ed. 2d 1142, this Court stated:

> "The fixing of penalties for crimes is a Congressional function, and what constitutes adequate punishment is ordinarily left to the discretion of the trial judge. If the sentence is within the statutory limit, appellate courts will not interfere unless clearly cruel and unusual." (Emphasis added)

This Court has previously adopted language found in the Tenth Circuit case of Smith v. United States, 273 F.2d 462 (10th Cir. 1959), which, in discussing the aspects of modifying a sentence of fifty-two (52) years for a first-time offender and which the considered "greater than should have been imposed," stated at page 468:

> "In effect, we are asked to enter the domain of penology, and more particularly that tantalizing aspect of it, the proper apportionment of punishment. Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, see Radzinowicz, A History of English Criminal Law: The Movement for Reform, 1750-1833, passim, these are peculiarly questions of legislative policy. Equally so are the much mooted problems relating to the power of the judiciary to review sentences. First the English and then the Scottish Courts of Criminal Appeal were given power to revise sentences, the power to increase as well as the power to reduce them. See 7 Edw. VII, c. 23, § 4(3); 16 & 17 Geo. V., c. 15, § 2(4). This Court has no such power."

Respondents submit that the Constitution of the United States permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences. See Williams v. Illinois, 399 U.S. 235, 90 S. Ct. 2018, 26 L. Ed. 2d 586 (1970).

In summation, it is clear that Petitioner has failed to prove a "purposeful discriminatory" action. Snowden v. Hughes, 321 U.S. 1, 8, 9, 64 S. Ct. 397, 88 L. Ed. 497, 508, 503. Therefore, Respondents submit that there has been no constitutional violation of the Equal Protection Clause of the Fourteenth Amendment and Petitioner's claim of constitutional infringement must fail.

PROPOSITION III

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT WHERE THE TRIAL COURT REFUSED TO DIRECT A VERDICT FOR PETITIONER OR GIVE THE REQUESTED INSTRUCTION ON ENTRAPMENT WHERE THERE WERE FACTS IN DISPUTE.

The Petitioner maintains that there was no evidence that the Petitioner had the predisposition to commit the crime of distribution of cocaine. He further maintains that his requested instruction which was refused was a large part of his defense and was based on the premise that the undercover agent was the one who first suggested the commission of the criminal act.

It is the Respondent's contention that there were not undisputed facts which as a matter of law established entrapment and, therefore, whether the Petitioner was entrapped was a matter to be determined by the jury. United States v. Swets, 563 F.2d 989 (10th Cir. 1977); Tzimopoulas v. United States, 554 F.2d 1216 (1st Cir. 1977).

In the case at bar, the evidence adduced at trial revealed that, although the petitioner did not initiate the discussion with the undercover narcotics agent, he did not object to her requests nor attempt to disuade the agent in her pursuit of the cocaine. In addition, the petitioner admitted that he had procured and sold amphetamines to the agent on a prior ocassion.

In light of the aforegoing facts and circumstances in the instant case, respondent would submit that petitioner, Mr. Sam, was not an innocent person without the disposition to distribute drugs and that the issue of entrapment was properly submitted to the jury in view of Swets and Tzimopoulas, supra.

In the alternative, Petitioner urges that the trial court erred in refusing to give his requested instruction on entrapment when the issue was submitted to the jury. A review of the record

indicates that the requested instruction on the issue of entrapment, although a correct statement of the law, was adequately covered by one actually given by the trial court; and, therefore, the petitioner suffered no prejudice. United States v. Swets, supra, at 990.

Therefore, the respondent would urge that the trial court's refusal of Petitioner's requested instruction was not a denial of due process of law.

PROPOSITION IV

WHERE NO TIMELY OBJECTION WAS RAISED, PETITIONER WAS NOT DEPRIVED OF DUE PROCESS OF LAW WHERE ALLEGED PROSECUTORIAL MISCONDUCT DID NOT GIVE RISE TO ERROR OF CONSTITUTIONAL DIMENSIONS.

Petitioner maintains that the prosecution asked improper questions on cross-examination and made improper and prejudicial statements during closing arguments thereby depriving him of a fair and impartial trial. An examination of the record reflects that in each instance there was a failure to object to the alleged improprieties. Moreover, the errors asserted were not contained in either the Motion for New Trial or the Petition In Error. The respondent submits the case of United States v. Brown, 540 P.2d 1048 (10th Cir. 1976), wherein the language of that opinion set out the general rule of law that failure to timely object to an alleged error constitutes a waiver which is not preserved for appellate review unless the alleged improprieties are of constitutional dimensions. United States v. Deluzio, 454 F.2d 711, 713 (10th Cir. 1972), cert. denied, 407 U.S. 922, 92 S. Ct. 2467, 32 L. Ed. 2d 808 (1972); United States v. Wheeler, 444 F.2d 385 (10th Cir. 1971).

Therefore, the respondent, relying on the aforementioned authorities, submits that the petitioner was not denied due process of law where the record clearly shows that the errors complained of were not of a fundamental constitutional nature and no contemporaneous objection was raised.

PROPOSITION V

THERE WAS SUFFICIENT EVIDENCE UPON WHICH TO FIND THE PETITIONER GUILTY BEYOND A REASONABLE DOUBT AFTER FORMER CONVICTION IN THE SECOND STAGE OF THE TRIAL.

The petitioner maintains that the only evidence admitted in the second stage of the trial, to-wit: Court Clerk Certificates from the State of Illinois reflecting prior felony convictions where no appeal was lodged, was insufficient to prove prior convictions. The convictions, admitted without objection, indicated that the petitioner was represented by counsel and the judgments were final. The petitioner did not offer evidence on his behalf.

The respondent submits the case of Louder v. State, Okl.Cr., 568 P.2d 344 (1977), which provided that where the name of the petitioner and the name of the person on the certified copy of the judgment and the sentence are identical and the petitioner fails to offer evicence on his behalf, the State has met its burden of proof that the petitioner was one and the same as the defendant named on the judgment and sentence from another court. See Williams v. Page, 289 F. Supp. 661, 663 (E.D. Okl. 1968); Tomlin v. Beto, 377 F.2d 276 (5th Cir. 1967); Wolfe v. Nash, 313 F.2d 393 (8th Cir. 1963), cert. denied, 374 U.S. 817, 83 S. Ct. 1713, 10 L. Ed. 2d 1041.

The respondent, therefore, submits that where certified copies of judgment and sentence were admitted, without objection, there was sufficent evidence to find the petitioner guilty after former convictions. Jackson v. Virginia, ___ U.S. ___, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

CONCLUSION

Oklahoma contends that there was no "purposeful discriminatory" action imposed by the Court of Criminal Appeals where the term of punishment was modified to correct judgment and sentence premised on a statute subsequently declared unconstitutional which resulted in a denial of equal protection. Nor was there a denial of due process by reason of the Court of Criminal Appeals' modification of term of punishment in light of its prior holding in Thigpen, supra. Even though the sentence imposed was under a

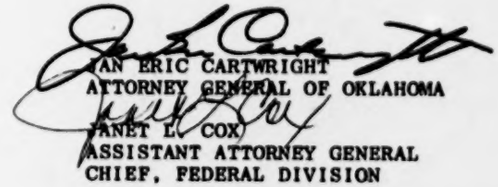
section of the Oklahoma Habitual Criminal Act declared unconstitutional, the remaining provisions of the Act were not impaired and the sentence, as modified, was clearly within the boundaries of the intact portion of the Act.

The twenty-five (25) year term is clearly within the accepted sphere of punishment followed in other jurisdictions for offenses of this nature. That it was enhanced by virtue of Mr. Sam's prior criminal acts clearly follows the legislative intent to authorize progressively greater sentences for habitual offenders.

Further, Oklahoma maintains that there was not a denial of due process of law where the trial court refused to direct a verdict for Mr. Sam or give the requested instruction on entrapment where there were facts in dispute. Moreover, the nature of such error, if any, is a matter of state law and does not rise to a constitutional magnitude. Nor was there a denial of due process of law where alleged prosecutorial misconduct, absent plain error, was not contemporaneously raised.

Finally, the admission of certified copies of court clerk records reflecting judgment and sentence for conviction of prior crimes was sufficient evidence upon which to sentence Mr. Sam under the Oklahoma Habitual Criminal Act. Such procedure was proper and was not a denial of due process.

Respectfully submitted,



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. . . .

AFFIDAVIT OF SERVICE

STATE OF OKLAHOMA)
: ss.
COUNTY OF OKLAHOMA)

I, Ronald Lee Johnson, depose and say that I am an attorney in the office of Jan Eric Cartwright, attorney of record for the State of Oklahoma, Respondent herein, and that on October 18, 1979, pursuant to Rule 33 of the Rules of th Supreme Court, I served one copy of the foregoing brief, by mailing the copy in a duly addressed envelope, with First Class postage prepaid, to the following:

George Eddie Sam, #94459
P. O. Box 97
McAlester, OK 74501

All parties required to be served have been served.

Ronald Lee Johnson
RONALD LEE JOHNSON

Subscribed and sworn to before me this 18th day of October, 1979.

Kenna Elizabeth Miller
NOTARY PUBLIC

My commission expires September 9, 1981.

mag/FC-2723